

Before

James C. Peck, Jr.
Arbitrator

In the Matter of Arbitration Between:

**FRATERNAL ORDER OF POLICE,
LODGE NO. 5**

V.

**AAA Case No. 01-15-0003-0331
Det. Sgt. Maurice J. Black (Terminated)**

THE CITY OF PHILADELPHIA

**Hearing Dates: September 10, 2015
Decision Date: October 21, 2015**

Appearances:

For the Union - Marc L. Gelman, Esq., Jennings & Sigmond, P.C.

For the City - Melissa T. Knight, Esq., City of Philadelphia, Law Department

Procedural Background

This arbitration was conducted pursuant to a collective bargaining agreement between the City of Philadelphia, Pennsylvania and Fraternal Order of Police, Lodge No. 5, which is the recognized exclusive collective bargaining representative for a unit of police officers employed by the City of Philadelphia.

The City of Philadelphia and FOP Lodge 5 are parties to a collective bargaining agreement with a term of July 1, 2014 through June 30, 2017.¹ This agreement contains, among other things, a Grievance-Arbitration procedure (Article XXI) culminating in final and binding arbitration under the auspices of the American Arbitration Association. The agreement also contains a residency requirement. Unlike the residency clause in the prior contract, which required police officers to live within the City of Philadelphia; the current agreement allows officers with more than 5 years tenure as a Philadelphia Police Officer to live outside the City, but within the Commonwealth of Pennsylvania.²

The instant matter arises from a grievance filed by the Union on February 18, 2015 on behalf of terminated Detective Sergeant Maurice J. Black, alleging that Det. Black had been terminated without just cause.³ Detective Black had received a 30 day suspension with Notice of Intent to Dismiss⁴ on January 22, 2015, and a Notice of Dismissal dated February 21, 2015, because of Black's alleged failure to meet an essential requirement for duty; namely residency within the Commonwealth of Pennsylvania. The Notice of Dismissal also asserted that Detective Black had engaged in conduct unbecoming of an Officer by lying or attempting to deceive during an interview with Internal Affairs.

This grievance was subsequently denied by the City, and when the issues of this dispute could not be resolved under the terms of the contractual grievance-arbitration procedure, the underlying grievance was referred to the American Arbitration

¹ See Joint Exhibit 1, in evidence.

² The residency requirements set forth in Section XXII (U) of the current collective bargaining agreement. read as follows:

Section XXII (U) (b): *"Effective January 1, 2012, employees who have five (5) or more years as a police officer in the City of Philadelphia will not be required to live in the City of Philadelphia."*

Section XXII (U) (c): *"All employees will be required to reside in the Commonwealth of Pennsylvania."*

³ See Joint Exhibit 3, received into evidence.

⁴ See Joint Exhibit 2, received into evidence.

Association for selection of a neutral arbitrator. Subsequently, by letter dated April 15, 2015, the undersigned was appointed arbitrator in this matter.

Pursuant to a Notice of Hearing which issued on December 23, 2008, an evidentiary hearing was conducted on September 10, 2015, at the offices of the American Arbitration Association at 230 South Broad Street, Philadelphia, PA. Both parties were represented by counsel, and at hearing were afforded the opportunity to examine and cross-examine witnesses, and to introduce relevant exhibits. The grievant, Detective Sergeant Maurice J. Black, was present and participated fully in the proceeding. Both parties made oral arguments on the record.

Issues

Did the City of Philadelphia violate the express terms of the collective bargaining agreement by discharging Detective Sergeant Maurice J. Black without just cause? If the City is found to have violated the terms of the collective bargaining agreement, what is the appropriate remedy?

Facts

Detective Sergeant Maurice J. Black (Badge Number 566) was employed by the Philadelphia Police Department from June 26, 1995 until the date of his termination. At the time of his termination Sergeant Black was assigned to the South Detective division, working the 4:00 PM to 12:15 AM tour of duty, on Squad I-C.

Det. Black had been the subject of a prior complaint received in June 2009, alleging that he lived in Delaware, and not in Philadelphia as required by the contract in effect at that time. As a result of that complaint, the Philadelphia Police Department, Internal Affairs Division conducted a residency investigation to determine whether Det. Black was complying with the City's residency requirements. That prior investigation,

captioned Case #09-1520, determined that Det. Black was residing at [REDACTED] New Castle, Delaware, instead of at [REDACTED] Philadelphia, Pennsylvania, the address listed in his personnel file. As a result of this investigation, an internal Investigative Report, dated September 18, 2012, was issued finding that the allegation that Det. Black was living in Delaware was sustained.⁵ However, no disciplinary action was taken against Detective Black at that time, and there is no evidence that this finding was grieved by Det. Black or by the FOP.

At the conclusion of this prior residency inquiry, Detective Black was informed of with the results of the Internal Affairs investigation, and advised that he needed to comply with the residency requirements. Black asserts that he asked what he should do to bring himself into compliance. Black contends that he was advised by his commanding officer to, "Spend more time in Pennsylvania."

The Recent Internal Affairs Investigation

The instant case arises as a result of a second complaint, filed in October 2013, alleging that Detective Black was still living in Delaware, and not in Pennsylvania as was then required. On October 14, 2013, Sergeant Joseph Nadolski of the Internal Affairs Division was assigned to investigate this new complaint.

Sergeant Nadolski pursued several lines of inquiry. He determined that Det. Black had listed his residence in his personnel file as [REDACTED] in West Philadelphia. Sgt. Nadolski examined voting records, and ascertained that Det. Black was registered to vote at the [REDACTED] address, and had last voted in the 2012 general election.

A check with the Pennsylvania Bureau of Motor Vehicles (BMV) established that Detective Black possessed a valid Pennsylvania driver's license, listing [REDACTED]

⁵ See Exhibit C-5, received into evidence.

A check with the Pennsylvania Bureau of Motor Vehicles (BMV) established that Detective Black possessed a valid Pennsylvania driver's license, listing [REDACTED] in Philadelphia as his residence. BMV records also established that Det. Black, along with his wife D [REDACTED] H [REDACTED], owned a 2011 Chevrolet, which was registered to the [REDACTED] address.

With regard to property ownership, Sgt. Nadolski examined property records maintained by the Philadelphia Office of Property Assessment, and determined that neither Det. Black nor his wife were listed as the owners of record of the [REDACTED] property, listed by Detective Black as his residence. Rather, that property was owned by C [REDACTED] B [REDACTED] and W [REDACTED] C [REDACTED], who had owned the property since 2004.

Internal Affairs, however, discovered other real estate listed in Det. Black's name. A review of the records of the New Castle (Delaware) Recorder of Deeds indicated that Det. Black and his wife, D [REDACTED] H [REDACTED] owned a residential property at [REDACTED] in New Castle, Delaware. Property records established that Det. Black and his wife had purchased the 2375 sq. foot, 4 bedroom, 2 bathroom house on [REDACTED] on February 25, 2003, for \$263,000. This property was owned jointly by Det. Black and his wife, via a deed naming both parties, which had been recorded on February 26, 2003.

Internal Affairs further investigated and determined from New Castle County public records that Det. Black was listed, along with his wife, as the mortgager of the [REDACTED] home in 2003 when the home was purchased, and that Det. Black continued to be obligated by several subsequent mortgages, refinancing the property in 2006 and 2011.⁶

⁶ See Exhibit C-1, admitted into evidence. It appears from this document that Detective Black and his wife paid-off the mortgage on their home on May 18, 2011.

Property tax records for the [REDACTED] property established that both Det. Black and his wife were listed as the taxpayers of record for the purposes of paying County, School, and Sewer taxes on the property.

With respect to the residence at [REDACTED] in New Castle, Delaware, the records obtained by Internal Affairs established that both Det. Black and his wife were listed as the beneficiaries of a State Farm Homeowner's Insurance Policy covering the property, and that the premium notices for that policy were mailed by State Farm to the attention of Detective Black at the New Castle, Delaware address.⁷

Regarding utilities, evidence was adduced establishing that the Comcast account for cable television, internet, and phone services at the [REDACTED] property was in Detective Black's name only, and that the monthly bills were mailed to him at the [REDACTED] address.⁸ Most other utilities, including water and electric service, were in the name of his wife, D [REDACTED] H [REDACTED].

As a result of this preliminary investigation, IAD Sgt. Nadolski drafted a *Request For Surveillance* on October 22, 2013, noting that a surveillance of Detective Sergeant Black was necessary to establish the residence of Det. Black.⁹

Thereafter, the Investigative Support Services unit (ISS) commenced a surveillance of Detective Black's daily activities. ISS works as a team, staking-out the homes of police officers suspected of violating the residency requirement. ISS documents their comings and goings, and follows them to and from work, to ascertain if the suspected police officers, in fact, live in Pennsylvania as required. The ISS unit detectives maintain extensive written logs, and sometimes surreptitiously videotape the daily activities of police officers suspected of violating the residency requirement.

⁷ See Exhibit C-7, admitted into evidence.

⁸ See Exhibit C-4, received into evidence.

⁹ See Exhibit C-6, received into evidence.

Commencing on October 29, 2013, and continuing through December 6, 2013, the ISS unit followed Detective Black. During this time period, Detective Black was observed at the [REDACTED] location in Philadelphia on only two occasions. On November 5, after completing his shift at 4:00 PM, Detective Black was observed arriving at the [REDACTED] location at 6:27 PM, remaining until 8:00 PM. However, the following morning at 6:21 AM, Detective Black's vehicle was observed at [REDACTED] [REDACTED] New Castle, Delaware, where he had evidently spent the night.

Later in the month, on November 21, 2013, Detective Black was observed at the [REDACTED] address from 12:50 AM to 1:40 AM. However, at 3:40 AM, Detective Black's vehicle was observed back at the [REDACTED] address in New Castle Delaware.

In all, surveillance was conducted on twenty-five days, and Detective Black was seen at the [REDACTED] address only twice. On more than 20 other occasions, the ISS team documented Detective Black's daily activities, including Black's departure from the [REDACTED] address before his shift, his route of travel to either the South Detective Division or to the Philadelphia Police Academy in Northeast Philadelphia, and his commute back to the New Castle, Delaware home he owned jointly with his wife.

This surveillance additionally documented various domestic activities, including Detective Black driving his daughter to school on November 18, 19, 20 and 21, 2013. On November 22, 2013, Detective Black was observed taking out the trash at the [REDACTED] [REDACTED] address.

As a result of all of this investigation by the Internal Affairs Division, on December 30, 2013 Detective Black was sent a letter advising him that he was the subject of a residency investigation, and requesting that he contact IAD to schedule a "*Residency Verification Interview*".

The Residency Verification Interview

IAD Sergeant Nadolski conducted the residency interview with Detective Black on February 28, 2014. Detective Black advised that he married his wife, D [REDACTED] H [REDACTED], in 2002, and that Ms. H [REDACTED] and their daughter have resided at the [REDACTED] New Castle, Delaware address since 2003. Det. Black asserted, however, that he has resided separately at [REDACTED] in Philadelphia for the past 43 years, with his mother, C [REDACTED] B [REDACTED] and her husband W [REDACTED] C [REDACTED].

According to Detective Black, the house at [REDACTED] is owned by his mother and her husband, but he assists with bills, despite the fact that there is no written lease or agreement for Black to financially participate in the operation of the household. Detective Black asserted that he had given his mother \$300 total in cash since the beginning of the year (presumably 2014).

Detective Black contended that his vehicles were registered at the [REDACTED] address, and that his Pennsylvania driver's license was issued to that address. Black claimed that his State Farm auto insurance policy also demonstrated his residency at [REDACTED] in Philadelphia.

During this interview, Black provided evidence that he had filed his 2010, 2011 and 2013 Federal Income Taxes using the [REDACTED] address, and that he used that address to receive statements for his account with the Police & Fire Federal Credit Union.

Detective Black provided his Credit Union statements for a 6 month period, presumably for the purpose of establishing the bona fides of his Philadelphia residency claim. These statements reflect a total of 340 transactions during the 6 month period in question. Of those transactions, 223 were purchases or cash withdrawals in Delaware. Only 117 transactions were conducted outside the State of Delaware.

job duties with Highmark Blue Cross, which required extensive overtime work. Further, Detective Black asserted that he was responsible for the care of his daughter during the period during which the ISS surveillance was conducted. According to Detective Black, this combination of events explained his frequent presence at the [REDACTED] New Castle, Delaware address,

Analysis and Discussion

As stated in the introduction of this Award, the issue to be decided herein is whether the City violated the terms of the collective bargaining agreement by discharging Detective Black. In order to make this determination, I will first determine whether Detective Black complied with the Residence Requirements set forth in Section 95.2 (a) of the Pennsylvania Code, annotated, which establishes the standard for determining if an employee is a resident of the Commonwealth of Pennsylvania.

The Pennsylvania Code is instructive with regard to what factors should be examined to determine "residency". Among the factors considered evidence of intent to continue to reside in the Commonwealth are the following:

1. Rent, lease or purchase of a property which the applicant has made a primary residence in this Commonwealth.
2. Payment of State and local taxes.
3. Registration of personal property, such as bank accounts, stocks, bonds and automobiles within this Commonwealth.
4. Possession of a current Pennsylvania driver's license.
5. Current registration to vote in this Commonwealth.

Other indicia of residency, used by this arbitrator and other arbitrators, include:

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1. The location where the employee spends the majority of his time,
2. The location where the employee's children attend school,
3. Whether the employee rents a home in the City, but owns a home outside the City.
4. The location where the employee engages in the majority of his social activities.

Applying these factors to the instant case, there is no evidence that Det. Black engages in any social activities in Pennsylvania.

With regard to where the Grievant spends his time, it is undisputed that Det. Black spends at least 8 hours per day in the City, performing his duties as a detective. The surveillance reports, however, show that Det. Black spends significant time, including most nights, at the [REDACTED] address in New Castle, Del. Further, Det. Black admitted during his interview with IAD that he spent most nights at the New Castle, Delaware address due to his wife's long hours of work, so that his daughter would not be unattended.

During his IAD interview, Det. Black was asked to explain why he had been observed at the [REDACTED] address in Philadelphia only two times during a month-long observation period, but 25 occasions at the [REDACTED] address during the same time period. Black's answer was that he did not want to drive (back to the [REDACTED] address) when he was tired, that it was unsafe to do so.

The evidence produced by the IAD investigation established that Detective Black's daughter attends the [REDACTED] in Newark, Delaware, which is consistent with her living with Det. Black and his wife in New Castle, Delaware.

With regard to the issue of property ownership, it is undisputed that Detective Black has no ownership interest or leasehold interest in the property at [REDACTED]. By way of contrast, Detective Black has for 12 years been a co-owner of the property at [REDACTED] in New Castle, Delaware, and has been signatory to a series of mortgages on that property. Detective Black has an insurable interest in that property and pays the premiums on the homeowner's insurance policy for that property. He also pays the property taxes and some utilities for the New Castle, Delaware property.

Some of the factors in Detective Black's favor include the fact that he has maintained a Pennsylvania driver's license, and registers and insures his automobiles in Pennsylvania. Detective Black also votes in Pennsylvania, and receives some mail at the [REDACTED] address.

However, in my mind the totality of the evidence clearly establishes that Detective Black is a resident of Delaware, and has failed to meet the requirement of establishing a bona fide residence within the Commonwealth of Pennsylvania. It appears that Detective Black has expended minimal effort to establish *an appearance* of residence in Pennsylvania, and that the [REDACTED] address is merely a mail drop. Given Detective Black's substantial attachment to, and presence in Delaware, it is impossible to conclude that Detective Black is anything other than a Delaware resident.

In cases of this sort, the City has the burden of proof in this matter, since this matter involves discharge, which is the "capital punishment" of the workplace. The burden of proof in Philadelphia residency cases has previously been determined by Arbitrators Thomas G. McConnell, Jr. and Alan Symonette as being to a "*beyond a reasonable doubt*" standard. *FOP, Lodge 5 and the City of Philadelphia (Clarke)*, AAA Case No. 14 390 1611 06; *FOP, Lodge 5 and the City of Philadelphia (Kurowski)*, AAA Case No. 14 390 1372 98. In the past, I have utilized this "reasonable doubt" standard, and it is my intention to apply the "*beyond a reasonable doubt*" standard in the instant case.

Black's Law Dictionary 161 (6th ed. 1990) defines "beyond a reasonable doubt" as "...fully satisfied, entirely convinced, satisfied to a moral certainty. This phrase is the equivalent of the words *clear, precise, and indubitable*."

Here, the overwhelming weight of the evidence establishes that Detective Black resides outside the Commonwealth of Pennsylvania, and has therefore violated the contract by failing to maintain a bona fide residence within the Commonwealth. Other than spending 8 hours per day on the job in Philadelphia, Detective Black possesses only "paper" indicia of residence in the Commonwealth, such as his Pennsylvania driver's license, vehicle registration, auto insurance, and income tax returns. All other factors establish that Detective Black lives the balance of his life in Delaware. The most persuasive evidence of this is the fact that his wife and daughter live in Delaware in a home they have owned for 12 years, and more than 65% of Det. Black's routine credit card purchases are made in Delaware.¹⁰

Finally, I cannot ignore the fact that Detective Black had been investigated previously by the Internal Affairs Division, and was found at that time to be in violation of the residency requirement in effect at that time. Detective Black was counseled at that time to conform his behavior to the requirements of the City Code. He evidently failed to heed this warning. As Arbitrator Symonette has noted in prior residency cases, the residency requirement is one of the few areas where an individual can be summarily terminated. Detective Black was fortunate that the City did not discharge him after the first IAD investigation, and that he was given a second chance.

However, having carefully weighed all of the evidence, I am "entirely convinced" and "fully satisfied" that the City has now met the high burden of proof necessary to sustain the discharge in this matter for failure to maintain residency either in the City, as required by the previous contract, or within the Commonwealth of Pennsylvania, as required by the current contract. In view of this conclusion, I decline to make a finding with respect to the second count against Detective Black, which alleges that Detective

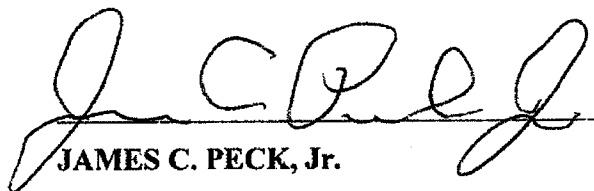
¹⁰ See Exhibits C-2 and C-3, received into evidence.

Black engaged in conduct unbecoming of an Officer during the IAD investigatory interview. Rather, I find that Detective Black's failure to meet the contractual residency requirement is sufficient grounds for termination, without regard to the merits of any other allegations.

AWARD

Based on the evidence, and the discussion as set forth above, the undersigned makes the following award:

The grievance alleging that the Police Department violated the collective bargaining agreement by suspending and discharging Detective Sergeant Maurice J. Black is hereby DENIED.

A handwritten signature in black ink, appearing to read 'J C Peck, Jr.', written over a horizontal line.

Arbitrator

Media, Pennsylvania

October 21, 2015